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787-477—65

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 469

FRANK LARGO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the court of appeals (Pet. App. 1–11) are reported at 346 F. 2d 253.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1965, and petitions for rehearing, and for rehearing en banc, were denied on June 21, 1965 (Pet. App. 12). On July 14, 1965, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including August 20, 1965, and the petition was filed on August 19, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court took adequate precautions to insure that no member of petitioner's jury had become prejudiced by newspaper articles published at the outset of petitioner's trial.

STATEMENT

A three-count indictment (C.T. 4–7),[1] filed October 17, 1963, in the United States District Court for the Northern District of Illinois, charged that petitioner and two codefendants, Joseph Tenuto and John Reynolds, possessed with intent to defraud (count 1), sold and transferred with the intent that they be passed as genuine (count 2), and conspired so to sell and transfer (count 3), counterfeited obligations of the United States having a face value of $29,000, in violation of 18 U.S.C. 472, 473, and 371, respectively. Following a trial by jury, all three defendants were found guilty on all counts (C.T. 16–18; Tr. 436–437). Petitioner was sentenced to ten years' imprisonment on each of counts 1 and 2 and five years on count 3, to run concurrently (C.T. 29, 33).[2] The court of appeals affirmed all of the convictions, one judge dissenting (Pet. App. 1–11).

1. The evidence adduced by the government may be summarized as follows:

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[1] "C.T." refers to the clerk's transcript, "Tr." to the reporter's transcript. Both transcripts are on file in the office of the Clerk of this Court.

[2] Tenuto received a total of eight years' imprisonment (C.T. 28, 32). Reynolds' sentence was the same as petitioner's (C.T. 30, 34). Each of those defendants appealed his conviction to the court of appeals, but neither has petitioned this Court for a writ of certiorari.

On September 21, 1963, Robert Motto, a special agent of the United States Secret Service, posing as a representative of persons in the "East" who were interested in large-scale purchases of counterfeit currency, bought one hundred counterfeit $10 bank notes from the defendants Tenuto and Reynolds, at a house in East Gary, Indiana, for $200 (Tr. 81–95, 114, 139). Motto told Tenuto and Reynolds that if his principals were satisfied with the quality of the notes he would "go for a bigger buy" at some future date, but that the "the price would have to be lower" (Tr. 88). Three weeks later, on October 11, Motto again met Tenuto and Reynolds, at a lounge in Chicago Heights, Illinois (Tr. 96–97, 105–107). Tenuto introduced Motto to petitioner, who agreed to sell Motto $100,000 worth (face value) of additional counterfeit bills, of the same denomination and style as those of the original purchase, for $15,000 (Tr. 97–104).

On the evening of October 14, 1963, petitioner and Tenuto visited Motto in a hotel room in Chicago which Motto had engaged (Tr. 107–117). They told Motto that they were able to make immediate delivery on only $29,000 of the promised $100,000 in counterfeits, but that the remaining $71,000 would be ready in about 24 hours if Motto could "wait over" (Tr. 111–113). Petitioner proposed to have someone meet Motto at an airport halfway between Chicago and the place in the East to which he assumed Motto would be returning, and to "deliver the $71,000" at that time (Tr. 113). Motto said that this plan was "too dangerous"; that he did not wish to risk a "heist" in a strange city with "a lot of genuine currency" on his

person; that he would, accordingly, for the time being, take only the $29,000 which was immediately available and leave it up to his principals whether to "go for the seventy-one" or buy some "new stuff" (Tr. 113–114). A price of "a little over $4,300" for the $29,000 was agreed upon, and arrangements were made to consummate the sale as soon as the banks opened on the following morning (Tr. 115–117).

At 9:30 on the following morning, October 15, Tenuto again called on Motto in the latter's hotel room, while petitioner remained "[d]ownstairs" (Tr. 117–118). Tenuto asked Motto if he was "ready to deal" and if he "had the money" (Tr. 118). Motto told Tenuto that the money was "in the bank" and that he "wanted to see what [he] was getting" before making payment (*ibid.*). A few minutes later, at petitioner's request, Motto and Tenuto joined petitioner in the coffee shop of the hotel. Motto and Tenuto then returned to the hotel room and petitioner left the hotel to "get the [counterfeit] money" (Tr. 118–119, 121–122). Five minutes later there was a knock on the hotel room door and Reynolds delivered a satchel containing $29,000 in counterfeit $10 bills (Tr. 122–126). Petitioner and his codefendants were arrested shortly thereafter by waiting detectives and secret service agents (Tr. 126–128, 369–370, 373–375).

The foregoing evidence, consisting substantially of testimony by agent Motto, was corroborated by (in addition to other evidence) a tape recording of the conversation between petitioner, Tenuto, and Motto in the hotel room on the evening of October 14 and of the conversation between Tenuto and Motto in the

first of the two hotel-room episodes on the morning of the 15th (Tr. 247–255, 321–322, 357–362). The recordings were made by an associate of Motto's, agent James Griffiths, who was stationed in an adjacent room (Tr. 6–8, 247–250). A mechanical failure in the recording apparatus prevented the recordation of the second episode of the morning of the 15th (involving the delivery by Reynolds of the $29,000 in counterfeits) (Tr. 13, 19–20, 255). Griffiths, however, through an amplifying device attached to the instrument, was able to hear the conversation and sounds associated with the latter incident, and he testified to the substance of what he heard (Tr. 13, 255, 259–262).

No evidence was presented by the defense (Tr. 392, 397).

2. On the morning of March 11, 1964, prior to the empaneling of the jury, a hearing was held on the admissibility of the tape recordings described above (Tr. 1–53). On the afternoon of the same day, after the recordings had been ruled admissible (Tr. 53–55), the jury was selected and sworn and the case continued to the following morning (Tr. 56–57). Prior to excusing the jurors for the day, the court admonished them not to read any newspaper articles they might see relating to the case, but left them otherwise free to read the daily papers (Tr. 62, 64–65, 149). That evening, under the headline "U.S. to Use Tape in Counterfeit Trial," the *Chicago's American* carried an article on one of its inside pages reporting the court's decision of that morning admitting the recordings, together with a number of background facts relating to the case. A like article, under the head-

line "Taped Evidence OKd in Counterfeiting Trial," appeared on an inside page of the *Chicago Sun-Times* on the following morning, the 12th. Both articles are reproduced in full in the opinion of the court of appeals (Pet. App. 3–5).

At the opening of court on the morning of the 12th, counsel for the defendants called the court's attention to the article in the *Sun-Times* and moved for a mistrial (Tr. 59–64). The trial judge called the jurors into the courtroom, one at a time, and, stating to them that it had come to his attention that there had been some newspaper articles relating to the case, asked each whether he had seen any such articles (Tr. 67–76). One juror, Ross Archer, said he had read the article in the *American* (Tr. 69–70). A second juror said that he had read the first few words of the article in the *Sun-Times* but had put it aside when he came across the judge's name (Tr. 71).[3] Two other jurors said they had seen only "the headline" (the name of the paper was not specified) (Tr. 67–68, 73). One of the latter two said she could not "even remember the headline" (Tr. 68), and the other that he had "skipped it" (Tr. 73). All four of these jurors denied that they would be influenced, or that their impartiality as jurors would be affected, by anything they had read (Tr. 68, 70, 71, 73). The

[3] The judge's name appeared at the beginning of the second paragraph of the article. The first paragraph stated simply: "A 45-minute tape recording of negotiations of three men charged with peddling counterfeit money was admitted as evidence in their trial Wednesday in U.S. District Court" (Pet. App. 3).

remaining jurors all denied having seen any articles pertaining to the case (Tr. 69, 72–73, 74–76).

Each juror, following his reply to the judge's inquiry, was, without objection by defense counsel, allowed to remain in the courtroom while the succeeding jurors were interrogated. Thus only the first of the jurors to be called was interviewed out of the presence of the other jurors.

On the basis of his inquiries and the jurors' replies, the judge ruled that there was no ground for a mistrial and denied the motion (Tr. 77). The jurors were again cautioned not to read any newspaper articles relating to the case, and the trial proceeded (*ibid.*).

At the afternoon session of the same day, defense counsel again moved for a mistrial, on the basis of the article in the *American* which juror Archer had acknowledged having read (Tr. 143–146, 149). This motion was also denied (Tr. 149), the judge observing that he had read the article and that he was of the opinion, as a result of his examination of juror Archer, that the latter's impartiality had not been impaired (Tr. 146).

In his instructions, the judge charged the jury that it was its function to determine the facts "solely on the evidence presented here in the courtroom." Each juror, he said, "must completely disregard any press, television or radio reports which you may have read, seen or heard. Such reports are not evidence; there-

fore, you should not be influenced in any manner whatever by such publicity."[4]

ARGUMENT

Petitioner's sole contention is that the appearance of the above-mentioned newspaper articles immediately prior to the commencement of the trial, and the alleged failure of the trial judge to take "proper precautions to offset the effects of" the articles, deprived him of a fair trial (Pet. 4–8). The contention is without merit.

"The trial judge," this Court has held (*Marshall* v. *United States*, 360 U.S. 310, 312),

> has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. *Holt* v. *United States*, 218 U.S. 245, 251. Generalizations beyond that statement are not profitable, because each case must turn on its own special facts. * * *

There was no abuse of discretion in this case. The trial judge, through inquiries addressed to each individual juror, satisfied himself that only one juror had read either of the articles in question in its entirety, and that juror was able to assure the judge that his impartiality as a trier of the facts had not been impaired by anything he had read. One other juror had read one of the articles in part, but the part which he had read (the opening paragraph) reported merely the fact that a pertinent tape recording had been admitted in evidence. Inasmuch as the jury was to

[4] See pp. 10, 15, and 20 of the reporter's supplemental transcript of the proceedings of March 16, 1964, on file in the office of the Clerk of this Court.

hear the recording in due course as part of the government's evidence, the judge could properly regard this portion of the article as innocuous. Two jurors acknowledged having seen "the headline," but since the headline in each case likewise reported merely the fact that a tape recording was to be used at the trial, the judge could similarly regard what those jurors had seen as non-prejudicial. All three of the last-mentioned jurors, moreover, like the juror who had acknowledged reading one of the articles in its entirety, assured the court that they felt that their impartiality had not been affected. None of the remaining jurors had seen either of the articles.

In addition, the judge stressed in his instructions that all of the jurors "completely disregard" any press, television, or radio reports they might have read, seen, or heard and that they base their verdict solely on the evidence adduced in the courtroom.

It is true that the judge's inquiries in this case, while addressed to the jurors individually, were not made to each in private, *i.e.*, out of the presence of all the other jurors. In *United States* v. *Accardo*, 298 F. 2d 133, 136 (C.A. 7.), the court below suggested that the trial judge, in a like situation, should question each juror privately, in order to overcome any "reluctance to speak out" which might be present. The same court, in *United States* v. *Jannsen*, 339 F. 2d 916, 919–920 (C.A. 7), however, pointed out that the *Accardo* case laid down no "rigid rule" in this respect.[5] In any event, petitioner is in no position to

[5] The relevant language in the *Accardo* decision was, moreover, contained in the opinion of but a single member of the court.

complain of the procedure which was in fact followed here, since he failed to object to it or to suggest any other course than the granting of a mistrial.

If counsel for petitioner believed, when the court's inquiries elicited the fact that juror Archer had read one of the pertinent articles, that the juror's ability to serve as an impartial trier of the facts had been irredeemably compromised, it would have been a simple matter for him to have requested the court to substitute the alternate juror (the record indicates that one such juror had been selected and that this juror, Theodore Green, was one of the jurors who had reported to the court that they had seen nothing in the newspapers relating to the case (Tr. 57, 76; C.T. 18)). No such request was made. Counsel contented himself, as we have said, with the making of a simple motion for a mistrial. In these circumstances, and particularly where, as here, the record "fairly shrieks the guilt of the parties" (*Lutwak* v. *United States*, 344 U.S. 604, 619–620), there is no basis for a claim of prejudicial error.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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